

Inconsistency of General Election System in Indonesia: Legal Arrangement

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Abstract

The choice of a particular electoral system will be a measure of the extent of consistency in the realization of the sovereignty of people. The greater of electoral system to provide a wide space for the people to decide, then the electoral system will be closer to the nature of popular sovereignty. The research uses normative-legal method or also called as doctrinal-legal research. The research approach used is statute, conceptual, case approach. The method of analysis used is qualitative-normative. The results show that the implementation of electoral system arrangement construction in the holding of general elections in Indonesia can be observed in the concept of Balloting, Districting, Electoral Formula. In the future, seat counting method in the election of members of the parliament should be formulated in the form of modified proportional systems in order to ensure the realization of the principle of equality of the voters vote and the proportionality of the election result and the formulation of norms in the legislation carefully, clearly and firmly, to preventing the possibility of multi-interpretation of legislation.

Keywords: Election System, General Election, Legal Arrangement

1. Introduction

Indonesia is a constitutional State. This has been clearly stated in Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia. The recognition of a State as a constitutional State (governmental by law) is very important since the power of State and political is not limited, unless need restrictions on the authority and the power of State and political and to prevent arbitrariness from the authorities. In a constitutional State, restrictions on the power of State and political must be made clearly that no one can violate. Therefore, in a constitutional State, the law plays a very important role and above the power of State and politics. Hence, it come the term “*government under the law*”.¹

The entrenchment of democratic rights and political reform will be a second major challenge for the government.² The period of Indonesian constitutionality expand normative facts, that the reform era gives big expectation for the renewal of State administration in order to deliver the Indonesian into a democratic constitutional State. One of the demands of reform is the amendment to the 1945 Constitution of the Republic of Indonesia. The demand for the amendment of the 1945 Constitution is a demand that has a conceptual theoretical rationale and based on empirical consideration that is the practice of Indonesian administration for half a century. The weaknesses of the 1945 Constitution of the Republic of Indonesia is conceptually provides an opportunity for the birth of an authoritarian government. The administration of the State is opposed to the principle of the sovereignty of the people, the principle of the State based on the law and also the process of organizing the general election which is dominated by certain elites opposed from the basic concept established in the 1945 Constitution of the Republic of Indonesia.

In the same way, Indonesia post-proclaimed independence on 17 August 1945 has recorded 11 (eleven) times of the holding of legislative elections. However, from time to time the general elections in Indonesia still emerge problems both from the existing legal framework as well as electoral organizers, election participants and voters in general elections and stockholders.

The provisions of Article 22E of the 1945 Constitution of the State of the Republic of Indonesia declare that general elections held in direct, general, independent, secret, honest and fair every five years held to elect members of the House of Representative, Regional Representative Board and Regional House of Representatives

¹ Fuady, M. (2011). *Teori Negara Hukum Modern (Rechtsstaat)*. Bandung: Refika Aditama, p. 1-2.

² Aspinall, E., & Mietzner, M. (Eds.). (2010). *Problems of democratization in Indonesia: elections, institutions and society*. The National Bureau of Asian Research. Institute of Southeast Asian Studies, p. 13

as organized by an election commission that is national, permanent, and independent.¹ General elections are complex activities involving multiple parties. Not only voters, electoral participant and/or candidate, electoral organizer and government (central and local), it also involve election observers (domestic and international), civil society organizations, law enforcer, procurement and distribution partners of electoral logistics, and mass media. Since the election is a process of converting the people vote to the seat of State organizers, and the election participants (political parties and proposed candidates and/or individuals) who fight to obtain and fill the seat of State organizer, the election results in winning and loser participants.

The electoral process is vulnerable to irregularities, temptations and potentially hijacked by irresponsible individuals. At the same time, there is great expectation from the public that elections are held with integrity. The choice of a particular electoral system will also be a measure of the extent of consistency in the realization of the sovereignty of people in the 1945 Constitution of the Republic of Indonesia. The greater of electoral system to provide a wide space for the people to decide, then the electoral system will be closer to the nature of popular sovereignty. If the electoral system narrows the space for the people to make their choice, then the electoral system will be further away from the nature of sovereignty contained by the 1945 Constitution of the Republic of Indonesia.

The proportional system with open candidate lists is a hybrid between proportional and district systems.² District nuance is indicated by the number of votes obtained by the elected candidate by giving mark twice for both party and name of candidate. Proportional nuance are seen when only voting just once by choosing the participant party image.³

The change of the electoral system has not stopped, after changing from the *stelsel* proportional system to the proportional system with the open candidate list, in general election 2009, the system applied is different again from the two systems that have been applied.⁴ The system is named open proportional system.⁵

The formulation of electoral system as an instrument to creates a democratic political system. Election lawmakers tend to formulate partial electoral systems or only see elements that directly affect the acquisition of seats alone, namely the election formulas and representative thresholds. Even tend not to pay attention to the consequences of vote taken for every element of the electoral system. As a result, the general election system of members of the Peoples Legislative Assembly and the Regional Peoples Legislative Assembly as stipulated in Act No. 8 of 2012 contains six elements which in its consequences are contradictory.⁶ As described above, the author focuses the study on the inconsistency of general election system arrangement in Indonesia.

2. Method of Research

The research uses normative-legal method or also called as doctrinal-legal research. The research approach used is statute, conceptual, case approach. The method of analysis used is qualitative-normative.

3. Implementation of Law Construction for General Election System Arrangement

Douglas W. Rae argues that an electoral system will work well if it is divided into 3 (three) phases in which each phase is important to note. These phases include: *First*, *balloting* or voting as a specification of the voter people's role in deciding whether to participate in the elections or not. *Second*, *districting* as a restricting factor in translating votes into seats; and *Third*, *the electoral formula* as determinant factor in translating votes into seats.

As above view that the concept of democracy in general elections has a requirement, that democracy only means if people have the opportunity to accept or reject the person or group of people who lead it. The opportunity to accept or reject it can only be done through general elections. Therefore, the general elections actually are an absolute requirement (*conditio sine qua non*) for the organizing of governance based on the principle of representative.

¹ Yusdar. (2010). *Analisis Hukum Penggunaan Kartu Tanda Penduduk, Kartu Keluarga dan Paspor Sebagai Tanda Pemilih Dalam Rangka Pemilihan Umum di Indonesia (Studi Kasus Putusan Mahkamah Konstitusi No. 102/PUU-VII/2009)*. Journal of Constitution at Centre of Constitution Study Hasanuddin University, Makassar. Vol.I No.1, November 2010. p. 12.

² Prihatmoko, J.J. (2003). *Pemilu 2004 dan Konsolidasi Demokras*. LP21 Press: Semarang. p. 30.

³ *Ibid*. Page. 30.

⁴ Except the general election system for the members of the House off Representative. For electing the member of the Regional Representatives Board is still remain use multi-representative district system.

⁵ See: Article 5 Paragraph (1) Act No. 12 of 2003.

⁶ Surbakti, R. (2014). *Understanding the Flaws in Indonesia's Electoral Democracy*, dalam Strategic Review, The Indonesian Journal of Leadership, Policy and World Affairs, Volume 4, Number 1 January-March 2014.

General election activity is also a most fundamental means of distributing human rights. Therefore, in the framework of the implementation of the citizen's human rights, it is imperative for the government to guarantee the implementation of the general election in accordance with the predetermined administration schedule, as argued by Asshiddiqie¹ that:

"as the principle of people sovereignty in which the people are sovereign, all aspects of the holding of the elections must also be returned to the people to decide it. It becomes a violation of human rights if the government does not guarantee the holding of elections, delaying the holding of the elections without consent of representatives, or do nothing so that elections are not held properly."

For instance, it is different with Jean Bodien that sovereignty is often interpreted as "*supreme authority*", a full and supreme authority within a State to regulate its entire territory without interference from the governments of other States. For Jean Bodien, sovereignty is absolute. The king is *legibus solutus*.² However, the theory of sovereignty is rejected by political-pluralism thought, according to Jean Boedin that theory of sovereignty is a narrow view and not based on strong reasons for rejecting a pluralist society. None of these groupings can take precedence or higher than others. To these problems arise several theories that give answers, each gives rise to a theory or doctrine of sovereignty.³

Furthermore, Asshiddiqie⁴ argues that based on the concept of freedom/ equality and the concept of people sovereignty are the foundations of democracy. The people sovereignty means the owner of the people sovereignty within the State is the people or known as the principles of power of the people, by the people and for the people. The people sovereignty is channeled and organized through constitutional procedures. It shows that Indonesia is a democracy State (*demokratische rechtsstaat*) and a democracy State that is not separate from one another.⁵

Democracy is a pillar to see and mark the practice of State administration for not to violate the limits of State power so as to trigger the risk of abuse of power. In addition, in the constitution we can see and measure the indicators of success and failures of the State in providing protection for the rights basic people, including in the guarantee of democracy and human rights. Democracy and human rights are basic norms in the life of a country.⁶

Broadly, there are two models in the general election related to the system of filling the membership of people representative institutions, namely organic and mechanical systems. The organic view places the people as individuals who live together in various kinds of living alignment based on genealogies (household, family), certain functions (economy, industry), social layers (laborers, farmer, intellectuals) and other social institutions.

Mechanical view places the people as a mass of the same individuals. Liberalism, socialism, and communism are all based on this mechanical view. The difference is that liberalism puts the individual as an autonomous entity and views society as a complex of interpersonal relationships that are contractual in nature, whereas socialism and especially communism prioritize the collective totality of society and undermine the role of individuals in the collective totality. However, all three above prioritize individuals as active voting controllers and view the public (voter corps) as a mass of individuals who each issue one vote in each election.

3.1. Balloting (Polling)

As in Article 148 paragraph (1) of Act No. 8 of 2012 that the polling of members of the House of Representative, Regional Representative Board and Regional House of Representatives shall be held simultaneously. Further, in article 149 paragraph (1) that voter who entitled to vote at the polling station includes:

¹ Asshiddiqie, J. (2006). *Pengantar Ilmu Hukum Tata Negara*. Jilid II. Konstitusi Press: Jakarta. p. 172.

² Samidjo. (1986). *Ilmu Negara*. Bandung: Armico. p. 140.

³ Yusdar. (2012). *Format Kelembagaan dan Pola Hubungan Antara Majelis Permusyawaratan Rakyat, Dewan perwakilan Rakyat dan Dewan Perwakilan Daerah Pasca Amandemen Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Thesis is unpublished. Postgraduate of Hasanuddin University of Makassar.

⁴ Asshiddiqie, J. (2003). *Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat Undang-Undang Dasar NRI Tahun 1945*. A paper is presented on Seminar Pembangunan Hukum Nasional VII a theme of *Penegakan Hukum Dalam Era Pembangunan Berkelanjutan* in Denpasar, 14-18 July 2003. p. 1.

⁵ Huda, N. (2010). *Ilmu Negara*. Jakarta: PT RajaGrafindo Persada, p.188.

⁶ Ilyas, A. (2010). *Suara Terbanyak dan Ambivalensi Demokrasi: Analisis atas Putusan Mahkamah Konstitusi Nomor 22/PUU-VI/2008*. Journal of Constitution at Centre of Constitution Study Hasanuddin University, Makassar. Volume I, No.1, November 2009.

- a. voters registered on the permanent voters list at the relevant polling station;
- b. voters registered on the additional voters list; and
- c. voters who are not listed on the permanent and additional voters list

The provisions article is further elaborated in Article 150 paragraph (1) that voters who are not registered on the permanent or additional voters list as referred to in Article 149 paragraph (1) letter c may use identity cards or passports. Then, the arrangement of Article 150 paragraph (2) states that for voters using identity cards or passport are valid.

According to author, this provision still limits the space of the society' justice in the implementation of elections in Indonesia because it must be done 1 (one) hour before the vote ends in this case at 12:00 to 13:00 in local time to use vote right, although in fact this arrangement has in line with the spirit of Constitutional Court Decision No. 102/PUU-VII/2009 concerning the use of identity card and passport in general election as well as the regulation of the General Election Commission No. 9 of 2013 concerning the Arranging of Voters List for General Election of Members of the House of Representative, Regional Representative Board and Regional House of Representatives. However, in practice the organizing emerge controversy because of the limitation of voting time that use identity card, family card and passport.

Above all, by analyzing the framework of legislation, then participation of voters is not participation for all citizens, but citizens who are in accordance with the provisions of the law above with its requirement. Voter participation refers to the presence of a citizen who has the right to vote in the polling station as regulated by the law. Arrangement related to voters list in the general election should contain the norm contained in the Decision of the Constitutional Court No. 011-017/PUU-I/2003 states that the right to vote in the general election is an embodiment of the right to the same position in the law and government.

The Constitutional Court in a case decision decided that the right to vote was the constitutional right of the citizens. The decision states that the constitutional right of citizens to vote and right to be candidate is a right guaranteed by the constitution, the law or international convention, then limitation of irregularities, omissions and the abolition of such rights constitutes a violation to the human rights of the citizens.

The holding of general elections in some countries,¹ voter participation is often a common issue as it relates to how many citizens are present to vote at the polling stations. Participation levels are often linked to the legitimacy of election results, as it will determine the people elected by the people to occupy certain positions.

The high level of participation is related to the level of legitimacy and trust of citizens to their representatives or people who are mandated to run the government and issue policies. As a part of the sustainability of democracy, the level of voter participation will also impact on who will win elections and regulate the lives of many people. Some democratic countries, including Indonesia make participation as one agenda that cannot be ruled out in the election process, especially in the case of the presence or absence of voter turnout.

Other problems that often occur at the voting stage in the implementation of the general election is voter data that is the problem of boundaries of jurisdiction in the administration of elections and the administration of population in 2 (two) districts/municipalities; validity of voter data, that the Permanent Voter List has been determined but there are still significant unregistered voters, the difference of the number of voter lists between *Sidalih*² and physical data (manual document). Whereas the process at the stage of voter data updating from elections to elections has always been very "sexy" to be questioned by candidates and people who feel harmed by their constitutional rights as voters.

3.2. Establishment of Electoral Region

As stipulated in Article 21 of Act No. 8 of 2012 that the number of seats of House of Representatives members shall be 560 (five hundred and sixty). Furthermore, the arrangement of Article 22 states that:

¹ Such as Australia and United State.

² Information system of voter list as used by the General Election Commission in 2014, although use *Sidalih*, the voter list for general election 2014 is still chaotic, it is proved become a focus for many state institution such as Domestic Affairs Minister, Commission II off the House of Representative, and Electoral Supervisory Board conduct examination. We are in commission II with the government (Domestic Affairs Minister), the General Election Commission and the Electoral Supervisory Board shall be conduct examination randomly" Said the vice-chairman of Commission II Arif Wibowo, post closed-hearing at the Office of Domestic Affairs Minister, Wednesday (25/9/2013). Accessed on <http://www.tribunnews.com/nasional/2013/09/25/tiga-lembaga-keroyokan-periksa-kesahihan-data-pemilih-buatan-kpu>. 27 January 2018.

- (1) Electoral region for members of the House of Representatives is province, district/municipality, or a combination of district/municipal.
- (2) The number of seats in each electoral region of the House of Representatives at least 3 (three) seats and at most 10 (ten) seats.

This provision does not yet have a clear basis for the determination of 3 (three) seats up to 10 (ten) seats per electoral region it means the House of Representative as an election-forming country body yet to be rational, has not paid attention to the principles of democratic elections, political justice and legal certainty. One of the principles of democratic elections is equality, namely the equality of vote as expressed by the term *opovov: one person, one vote, one value*. This principle asserts that the value of vote of voter is same in an election. Therefore, the price of the representative seats is approximately same. The 1945 Constitution guarantees equality of votes, as governed by Article 27 paragraph (1) that all citizens shall have their positions in law and government and shall uphold such law and government with no exceptions.

The principle of national equality in electing members of the House of Representative should be implemented in the allocation of seats of the House of Representative to the province and the establishment of electoral region. In fact, the 2009 elections show that the principle of equality is not consistently implemented so that some provinces are over-represented while some other provinces are under-represented (the number of seats is less than they should be). This situation, of course, has an impact on the price of seats that are also unequal between electoral region, where the price of seats in over-represented provincial elections is certainly cheaper than the price of seats in electoral region in underrepresented provinces.

The establishment of electoral region in the 2014 election also indicates that non-compliance with the principles of the formation of electoral region. In addition to the imbalance in the price of seats between electoral regions; there is also an integral and continuous electoral region, such as Bogor City which is united with Cianjur district in West Java III, or Metro City which is united with some districts to the south in Lampung I. In order to avoid violations the constitution in maintaining the principle of equality of votes in the election of members of the House of Representative, as well as to uphold the principle of integrality and continuity of the region, and the cohesiveness of the population, then ideally need a clear standardization in the determination of electoral region and the determination of the number of seats per electoral region.

If we compare to other countries using *fixed seat* method in determining the number of parliamentary seats so that no matter how many inhabitants, the number of parliamentary seats remains. In addition to the consideration of parliament efficiency, this method can also maintain constituent relationships with the candidate, because if the number of seats does not change then the electoral region is also unchanged.

The establishment of electoral region is based on the principle of equality, territorial integrity, regional sustainability and population cohesiveness. The principle of equality means the price of seats in each electoral region is equal; the number of seats between one electoral region and another that adjacent is equal.¹ The principle of territorial integrity means that the formation of electoral region should take into account geographical unity of the territory. The principle of regional sustainability means that the establishment of electoral region should not separate one electoral district from another. While, the principle of population cohesiveness means the formation of electoral region taking into account the similarities of socio-cultural conditions of society in an electoral region.

The combination of the principle of equality, territorial integrity, sustainability and the population cohesiveness in the formation of regions causes the price of seats in each electoral region to be impossible to match. In this case, the electoral experts can still tolerate the difference in seat price as far as no more than 10% and not less than 10%. Because equality is the first principle, then in establishing the electoral region, we first calculate the price of 1 seat of the House of Representative in each province, by dividing the total population of the province by the number of seat the House of Representative. Based on the price of one seat of the House of Representatives then counted the quota of seats each district/municipalities in one province.

Ideally, the establishment of electoral region should be based on the principle of equality of citizenship in law and government which in the election study are called "*one person, one vote, one value*". Implementation in the election appears on the determination of seat allocation for each electoral region; each gets seat allocation in accordance with the number of residents who are domiciled in the region. This principle is manifested to prevent the emergence of "under-represented" or "over-represented".

If the number of seats and residents per province is compared, the voter votes residing in over-represented

¹ Hadiz, V. (2003). Reorganizing political power in Indonesia: A reconsideration of so-called 'democratic transitions'. *The Pacific Review*, 16(4), 591-611.

electoral region are higher than whom residing in under-represented electoral region. The price of one seat in the over-represented is lower than the price of the seat in the under-represented region. Therefore, the allocation of seats for electoral region has not guaranteed equality of voting strength.

3.3. Election Formula

The election formula and the determination of the elected candidate is an absolute element of an electoral system. This element is absolute for the electoral system because through the election formula determined election participants who managed to get a seat in the House of Representative and through the determination of elected candidates also determined then acquisition of the seat of political parties then allocated to elected candidates. This is the discussion on this indicator.

In simple, the election formula is defined as a formula for determining the election participant who gets the seat or in other words a formula for determining the seats of each participant or contestant. In the practice of elections, there are two commonly known formulas for determining elected participants who are eligible to win seats: majoritarian/plurality and proportional formulas (balanced representation).

By using majoritarian/plurality, then the determination of election participants who managed to get seats in an electoral region is determined by majority vote. While, the proportional formula, the acquisition of seats is determined proportionally (balanced) by the percentage of vote in each participant in the concerned electoral region.

Majoritarian/plurality formulas are used in electoral systems with single member constituency, in which one electoral region selects only one representative. The method is simple that the political parties participating in the election that get majority votes and plurality directly take a seat. While, the losing political parties, its vote is considered zero and automatically does not get a seat.

In its application, the majoritarian/plurality formula is not only serves to determine the election participants (political parties) who managed to gain seats, but at the same time also determine the elected candidates. This happens because as mentioned majoritarian/plurality formulas are used in elections with single representative roles. Here, the number of candidates from each political party participating in the election for one electoral region each only one, so the acquisition of seats for political parties is equal, it means seat acquisition automatically for the candidate of the respective political party.

The determination of elected candidates is only required for proportional systems. While, the majoritarian system with only one seat per electoral region and only one candidate for each political party does not require a seat allocation method to the candidate, because the seat of an automated political party is also a candidate seat in question.

In the development of the electoral process in Indonesia, in the last two legislative elections, in 2009 and 2014, there was a policy on the parliamentary threshold. Parliamentary threshold is the amount of legitimate votes of political parties to be able to send their representatives in parliament. The constitutionality of the enactment of the parliamentary threshold is also refers to the legal considerations in the Decision of Constitutional Court No. 3/PUU-VII/2009. Therefore, the two legal considerations in the decision No.3/PUU-VII/ 2009 and No. 52/PUU-X/2012 become the juridical basis which states that parliamentary threshold is constitutional. There is no discrimination in the enactment of parliamentary threshold because the policy applies to all political parties participating in the election. In the case of a party that fails to enter the parliament because it does not meet the parliamentary threshold, it is fairness in a competition called the election, because in every competition, it is natural to win and lose. Likewise with elections, there are political parties who have successfully passed the parliamentary threshold, but some are failing.

According to the author, the enactment of the parliamentary threshold that has a legal effect on the loss of seats of political parties that have no seats in the House of Representative, but the political parties meet the provisions on the number of voters in the regions and make those seats owned by other political parties actually does not meet the number of voter dividers, but has a seat in the House of Representative, it is contrary to the sovereignty of people and the purpose of elections.

The determination of required number, 1% or 5% or 10% etc up to a certain number obviously need to be questioned. Because in the presidential system, the electoral order (legislative election first then presidential, which is obviously absent in this world), it is easy to understand that the basis is the manipulation of the big parties (the legacy of the new order that has enjoyed the power facility) to maintain status-quo. In this way, the parties of the New Order monopolized the determination of the Presidential and the Vice-President. The people language is political brokers for the bourse of Presidential and Vice-President candidate and this manipulation is

implemented through the law so that it becomes impressed constitutional. It is complete the betrayal of the meaning of this constitution. This way has gone beyond the means of a coup that is a visible power struggle, because by distorting the meaning of the constitution through the Act, treason against the sovereignty of the people is done legally on behalf of the constitutional State.

4. Conclusion

Implementation of electoral system arrangement construction in the holding of general elections in Indonesia can be observed in the concept of: *Balloting, Districting, Electoral Formula*. The implementation of *balloting* arrangements still has a weakness in realizing people's sovereignty in the general elections in Indonesia. Implementation of the electoral formula arrangement construction still has weaknesses due to the existence of arrangements that ignore the nature of people sovereignty as there is a regulation of the parliamentary threshold. Ideally, the arrangement of *balloting* shall contain the norms contained in the Decision of the Constitutional Court No. 011-017/PUU-I/2003 stating that the right to vote in the elections is the embodiment of the right to equal position in law and government and decision of the Constitutional Court No. 102/PUU-VII/2009.

In the future, seat counting method in the election of members of the House of Representatives should be formulated in the form of *modified proportional systems* in order to ensure the realization of the principle of equality of the voters vote and the proportionality of the election result and the formulation of norms in the legislation carefully, clearly and firmly, to preventing the possibility of multi-interpretation of legislation.

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